

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE: Friends of the Earth and Sierra Club,)
Complainant/Petitioner v. South Carolina)
Electric & Gas Company,)
Defendant/Respondent)

IN RE: Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920

**SOUTH CAROLINA OFFICE
OF REGULATORY STAFF
PETITION FOR REHEARING
OR RECONSIDERATION**

IN RE: Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

Introduction

Pursuant to S.C. Code § 58-27-2150 and 10 S.C. Code Ann. Regs. 103-825, and applicable South Carolina law, the South Carolina Office of Regulatory Staff (“ORS”) hereby respectfully petitions the Public Service Commission of South Carolina (“Commission”) to rehear or reconsider its findings and conclusions in Order No. 2018-804 (“Order”), and alternatively, to clarify its findings and conclusions regarding the Tax Cuts Jobs Act of 2017 (“TCJA”). The Order was served on ORS on December 21, 2018.

ORS petitions the Commission for a rehearing or reconsideration of the Commission’s determination regarding the following five issues: (1) the Commission’s failure to find that South Carolina Electric & Gas Company (“SCE&G”) acted imprudently and that as a result costs incurred on the new nuclear project (“Project”) after March 12, 2015 are disallowed; (2) the failure of the Commission to find that revised rates revenue increases corresponding with capital cost recovery in 2015 and 2016 and **all** revised rates collected after August 1, 2017, should be returned to customers; 3) the Commission’s failure to impose merger conditions related to possible expansion of the Atlantic Coast Pipeline (“ACP”); 4) the error of the Commission in awarding the Joint Applicants a Return on Equity (“ROE”) which is not supported by the record; and 5) the failure to require SCE&G to reduce its electric rates to flow through to customers all benefits of the TCJA. As to the TCJA, ORS asks that if benefits are not immediately flowed through to customers, that alternatively the Commission revise Order 2018-804 to maintain regulatory accounting treatment as provided in Commission Order No. 2018-308 and order that any estimated benefits of the TCJA be reconciled to actual tax savings benefits and be provided to SCE&G Customers in the next general rate case.

Additionally, ORS supports the position advanced by the Sierra Club, Friends of the Earth, and AARP on the request that the Capital Cost Rider for recovery of the new nuclear abandonment costs should be separately identified on the customer bill. SCE&G Customers have a distinct interest in knowing the dollar amount impact of the decisions reached by the Commission.

As detailed below, ORS believes the substantial evidence on the whole record supports the position of ORS regarding these five issues and that the Commission's ruling regarding these issues was both arbitrary and capricious. ORS therefore urges the Commission to reconsider its previous findings and conclusions contained in Order No. 2018-804 on the specific issues raised in this Petition for Rehearing or Reconsideration.

Standard of Review and Applicable Law

Pursuant to S.C. Code Ann. § 58-27-2150, a party may apply to the Commission for a rehearing in respect to any matter determined in the proceeding. "The purpose of a petition for rehearing and/or reconsideration is to allow the Commission the discretion to rehear and/or reexamine the merits of issued orders pursuant to legal or factual questions raised about those orders by parties in interest, prior to a possible appeal." In re: South Carolina Electric & Gas Company, Order No. 2013-05 (Feb. 14, 2013). S.C. Code Ann. Regs. 103-825(A)(4) prescribes the content of a petition for rehearing, which must include: "(a) The factual and legal issues forming the basis for the petition; (b) The alleged error or errors in the Commission order; [and] (c) The statutory provision or other authority upon which the petition is based."

The South Carolina Supreme Court employs a deferential standard of review when reviewing a Commission decision and will affirm that decision when substantial evidence supports it. *See, Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 357 S.C. 232, 593 S.E.2d 148, 151 (2004). Because Commission findings are presumptively correct, the party

challenging a Commission order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. *Id.* Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. This deferential standard of review does not mean, however, that the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning. The Commission must fully document its findings of fact and base its decision on reliable, probative, and substantial evidence on the whole record. *Id.* It must make findings which are sufficiently detailed to enable the Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. *Id.* Regarding factual findings, the Supreme Court recognizes that the Commission is designated an expert to regulate the rates and services of public utilities in South Carolina, and as a result, the Commission has a heightened duty to make "explicit findings of fact which allow meaningful appellate review of these complex issues." Seabrook Island Property Owners Assn v. South Carolina Public Service Comm'n, 401 S.E.2d 672, at 674; 303 S.C. 493, at 497 (1991).

The applicable law for the review of the abandonment costs in this case is the Base Load Review Act, as amended by Act 258. The definitions of the terms "imprudent" and "prudent" to be applied in this case are contained in § 58-33-220 (Supp. 2017 as amended by 2018 S.C. Acts 258) which defines imprudence as: "[i]mprudent or imprudence includes, but is not limited to, lack of caution, care, or diligence as determined by the commission in regard to any action or decision taken by the utility or one acting on its behalf including, but not limited to, its officers, board, agents, employees, contractors, subcontractors, consultants affecting the project, or any other person acting on behalf of or for the utility affecting the project. Imprudent or imprudence includes,

but does not require, a finding of negligence, carelessness, or recklessness. Imprudence on behalf of any contractor, subcontractor, agent, or person hired to construct a plant or perform any action or service on behalf of the utility shall be attributed to the utility.”

Act 258 also defines prudence: “(p)rudent, prudence, or prudence means a high standard of caution, care, and diligence in regard to any action or decision taken by the utility or one acting on its behalf including, but not limited to, its officers, board, agents, employees, contractors, subcontractors, consultants affecting the project, or any other person acting on behalf of or consultants affecting the project, or any other person acting on behalf of or for the utility affecting the project. To the extent a utility enters a contract with a third party that delegates some or all decision-making authority related to the project, the utility retains the burden of establishing the prudence of specific items of cost or specific third-party decisions. Prudent, prudence, or prudence also requires that any action or decision be made in a timely manner.”

South Carolina Code § 58-33-220 also provides guidance to consider when evaluating imprudent and prudent decisions by a utility. It states, “[i]n determining whether any action or decision was prudent, the commission shall consider, including, but not limited to: (a) whether the utility acts in a timely manner, with any passage of time which results in increased costs or expense prior to the utility acting or making the decision weighing against a finding of prudence; (b) whether prior actions or decisions by the utility were imprudent and such imprudent actions led to a decision by the utility that could otherwise be prudent. Such circumstances weigh against a finding of prudence; and (c) any other relevant factors, including commission of a fraudulent act, which are deemed not to be prudent. As used in item (c), ‘fraud’ includes, in addition to its normal legal connotation, **concealment, omission, misrepresentation, or nondisclosure of a material fact in any proceeding or filing before the commission or Office of Regulatory Staff.**

Proceedings and filings to which the provisions of this paragraph apply include, but are not limited to, **rate or revised rate filings**, responsive filings, motions, pleadings, briefs, memoranda, document requests, and other communications before the commission or Office of Regulatory Staff.” (emphasis added).

Arguments

1. The Commission Erred in Failing to Find that SCE&G Acted Imprudently and That All Capital Costs Incurred on the Project after March 12, 2015 are Disallowed

The Commission’s Order fails to make any “prudency determinations associated with costs expended for the NND Project” as specifically requested in the Joint Applicants’ Application in Docket 2017-370-E. The Order instead states that: “[t]he Commission finds this schedule, as updated as ordered above, constitutes an appropriate schedule for capital costs for the Project in abandonment, under S.C. Code Ann. §58-33-270(E) and S.C. Code Ann. § 58-33-280(K).” Order No. 2018-804, pg. 44. In fact, the Order fails to make any specific determination of imprudence regarding the actions and/or inactions of SCE&G and its role in supervising the planning, scheduling, costs and construction of VC Summer Units 2 and 3 after March 12, 2015 and ignores Act 258’s definitions of prudence and imprudence related to the determination of allowable costs for the Project. Act 258 is the current law and should be applied.

The Commission has failed to address the prudence or imprudence of Project costs as raised in the Joint Applicants’ Petition. ORS believes that this is an unlawful abrogation of the Commission’s statutory duty to make a prudency determination. Absent a specific finding that SCE&G made decisions or acted in an imprudent manner which led to significant and material misstatements of Project estimated costs and completion dates in filings to the Commission, the law presumes all costs are prudent and must be recoverable fully. (S.C Code Ann. § 58-33-280(K)).

Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs. The commission shall order the amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting rates under this article. (emphasis added).

There has been no consensus regarding the recoverability of abandonment costs in this proceeding, and various parties have presented different positions as to the amount of abandonment costs that should be found to be imprudent and thus disallowed.¹ The Commission errs when it states that “[s]uch an agreement makes claims of imprudent expenditures after that date moot.” Order, pg.18.

The Commission's Order is in error in its adoption of “...an agreed upon cut-off date for investment.” Order, pg.18. The date of March 12, 2015, is supported by substantial evidence in the record and the Order acknowledges it is “..beyond dispute that SCE&G failed to disclose any iteration of the Bechtel Report to ORS or the Commission.” Order, pg. 18. As economic regulators, the Commission is required to serve the public of South Carolina by providing open and effective regulation and adjudication of the state's public utilities, through consistent administration of the law and regulatory process. The Commission must adjudicate issues raised in the Joint Application. The Commission cannot side-step the issue of prudence or imprudence related to the allowable Project costs but instead must make a clear finding, based on the Record, that Project costs after March 12, 2015, are disallowed due to imprudence.

¹ On December 24, 2018, the Sierra Club and Friends of the Earth filed a Petition for Rehearing or Reconsideration with the Commission requesting that the Commission find all abandonment costs imprudent. AARP proposes that costs after May 6, 2014 are imprudent, leaving only \$2.2 billion in abandonment costs. (AARP Brief Proposed Order p. 3-4). SCEUC takes the position that because SCE&G was out of compliance with its BLRA order, there should be no recovery of revised rates post July 31, 2017, or abandonment costs. (SCEUC Post Hearing Brief at p. 18).

The Record in this proceeding established that SCE&G deliberately chose to hide a significant management decision made in late 2014 that an outside and independent cost and schedule review would be conducted.² SCE&G deliberately hid from the Commission its own late 2014 internal estimate at completion (EAC) that was \$500 million more than the costs filed with the Commission on March 12, 2015.³ The fact that SCE&G forecasted that the Project was economical with an additional \$3.1 billion to \$3.8 billion dollars does not make the amount of \$500 million dollars less adverse or less material to the capital cost schedule SCE&G requested be approved by this Commission in Docket No. 2015-103-E. S.C. Code Ann. § 58-33-280(B) states, “[t]he revised rates filing shall include the most recent monitoring report filed under Section 58-33-277(A) updated to reflect information current as of the date specified in the filing.” (emphasis added). It was not. Furthermore, the CEO for SCE&G encouraged this Commission to believe at that time, that the amount sought, \$698 million, would actually be negotiated down not up. Hearing Exhibit 15, pg. 1720, ll. 9-16.

SCE&G filed costs and a construction schedule prepared by the Consortium which neither SCE&G nor Santee Cooper deemed reliable.⁴ Yet SCE&G made representations to this

² Hearing Exhibit 14, pgs. 0439-0440. Oct. 31, 2014 SCE&G email correspondence to Santee Cooper discussing the hiring of a third party to look at “our schedule and onsite efficiencies at VC Summer construction project.”

Hearing Exhibit 14, pg. 0574. June 1, 2015 Discussion of having Bechtel retained by George Wenick, “if there is an advantage in doing so.”

Hearing Exhibit 14, pg. 1077. “Assessment is not...(and has never been ...intended to position Owners for litigation...)”

Hearing Exhibit 14, pg. 1207, July 13, 2015. “We are sensitive to your concerns about disclosure, but definitely feel that the Owners need to be the hiring agency....” At no point during the July 2015 hearing in Docket No. 2015-103-E was there ever a mention of retaining a third party to conduct an assessment of the schedule and the status of the Project.

³ Hearing Exhibit 16, pgs. 0470-0472, Ken Browne was instructed as to what to tell ORS. Only the Consortium’s EAC was presented to ORS even though the Consortium’s EAC was not attainable.

⁴ Hearing Exhibit 16, pg. 0582. August 5, 2014, SCE&G internal email: “The schedule is a joke... It is easily adjusted to display anything CBI wants to show us.” Hearing Exhibit 16, 0613, August 27, 2014, “How is schedule work going? Close to wrapping up?” “... I don’t know that ‘wrapping up’ is a good description. Covering up is probably better. We have a schedule that shows completion of Unit 2 in September of 2018 and Unit 3 in September of 2019, on paper.If I honestly believed any of this was possible, I would stop on the way home and buy a lottery ticket, just one.” Hearing Exhibit 15, April 6, 2015, Charts discussed in March 6, 2015, Executive Steering Committee meeting: pgs. 0326-0329. “A total cost curve is not shown because it would be off the chart.”

Commission that the Consortium cost and schedule were accurate⁵ while knowing it was both unattainable and inaccurate.⁶ SCE&G then took every step it could to keep that information hidden.⁷ The Commission cannot conclude that such conduct was either prudent or acceptable to the Commission.

In addition, the Record contains substantial evidence of the steps SCE&G took to “flush” the Bechtel Report and avoid disclosure to the public and Commission.⁸ These actions and decisions by SCE&G represent a deliberate and ongoing effort by the Company to conceal, omit, misrepresent and fail to disclose material facts regarding significant economic information and dates of completion from the Commission. The Order fails to address SCE&G’s imprudent actions and decisions as demonstrated by the evidence in the Record. The Order’s lack of a finding on this subject results in the Commission determination that SCE&G’s intentional and systematic steps to mislead the Commission, ORS, Investors and the public as prudent. It is essential to restore public trust for the Commission to acknowledge that the regulatory compact between the utility and regulators was broken by SCE&G.

During the Commission meeting held December 14, 2018, the Commission discussed a motion from a Commissioner to amend the Order to include a finding that it is imprudent to

⁵ Hearing Exhibit. 15, p. 1744, ll. 10-16; p. 1745, ll. 9-17, Byrnes testimony that SCE&G own team reviewed Consortium EAC and was good.

⁶ Hearing Exhibit 16, pg. 0229, August 25, 2014, SCE&G email regarding petition to be filed with the Commission: “I think this needs to be the schedule we plan to file with the PSC (**whether we think it is achievable or not**).” Hearing Exhibit 16, 1454 SCE&G internal email regarding Consortium provided EAC: “As far as alignment on schedule and cost is concerned this is going to be a very difficult and contentious process based on cost information we’ve been provided.” Hearing Exhibit 16, pg. 0584, January 22, 2015, Update on real schedule status. “Just learned that the June 2019 U2 SCD is June 26th. Even this is not real....” Hearing Exhibit 15, pg. 2120, “Bechtel projection on commercial dates is sobering.”

⁷ Hearing Exhibit 16, pgs. 1507-1508, Wenick instructs Bechtel only he can receive the report and may not want a final report. “Please hold the final report. That is extremely important.” Santee Cooper asks SCE&G if they can share Bechtel report with their customer: Hearing Exhibit 14, pg. 1184, November 23, 2016, “They are adamantly opposed to this release.”

Hearing Exhibit 15, pg. 1052, SCE&G concerns. Bechtel Report Action Plan, “What disclosures to make to ORS.”

⁸ Hearing Exhibit 16, pg. 0987, “we agreed to the CORB in return for **flushing Bechtel report**.”

knowingly withhold significant and material information from the Commission. Commissioner Ervin expressed his opinion that the evidence in this case showed that substantial information regarding the Project was withheld; however, when the issue of an express finding of imprudence was discussed, the Commission voted to refrain from making such a finding as unnecessary and out of concerns related to possible future criminal exposure and possible impact on the merger. Tr. pg. 32, ll. 28-32; pg. 33, ll. 1-23. ORS respectfully submits that whatever activities occur in other forums in the future, a determination of criminal or civil liability is beyond the jurisdiction of this Commission and should not serve as the basis for not rendering the statutorily mandated imprudence decision in this Docket. The evidence in this case established that the regulatory process was subverted by SCE&G to the detriment of its Customers and the public, and this type of behavior cannot be tolerated. The absence of a finding of imprudence under these circumstances which are supported by the Record, undermines the regulatory process and promotes continued lack of transparency and loss of public trust in the regulatory and rate setting process for which the Commission is responsible.

Finally, ORS could not find any reference in the record that the merger is in any way contingent on this Commission foregoing a finding of imprudence, and any such condition on merger approval is wholly inappropriate and is counter to the BLRA and the public interest. As a further sign that Dominion is already proceeding with its plans to acquire SCANA and its subsidiary SCE&G, regardless of any future acts or Orders by the Commission, a filing with the New York Stock Exchange made on Thursday, December 27, 2018 states that Dominion expects to finalize the buyout of SCANA on January 1, 2018. *See, The State*, December 28, 2018, pg. 1A.

While the Joint Applicants adopted ORS's March 12, 2015 date for the voluntary disallowance of the recovery of Project costs in their "Plan B-L", this does not eliminate that fact

that SCE&G concealed and omitted material and adverse information related to the Project from the Commission. SCE&G's actions after March 12, 2015, constitute imprudence as defined by Act 258 because information available to SCE&G at the time allowed them the opportunity to avoid or minimize the abandonment costs. The evidence in the Record supports the Commission making a finding of imprudence based on gross negligence, negligence, carelessness, and recklessness based on the following:

(1) Claiming to have delegated to an outside attorney, who is not an engineer, the responsibility of editing and reviewing the draft Bechtel Report on a multi-billion-dollar nuclear project simply cannot be considered prudent⁹. It was also not prudent for the Company to spend \$1,000,000 for a third-party assessment of the Project, a written report called the "Bechtel Report" and the separate "Bechtel Report Schedule Assessment," for which customers paid a blended return of 11% and 10.5% and financing costs in the form of revised rates revenue, and then to have the SCE&G's Chief Operating Officer (COO) dismiss the assessment of the schedule as not useful or reliable. Tr. Vol. 15, pgs. 4074-4075. The COO never acknowledged whether or not he had read the earlier drafts of the Bechtel Report, and he never even bothered to obtain or read the final Bechtel Report Schedule Assessment. Tr. Vol. 15, pgs. 4075-4076, 4127-4128. But, after summarily dismissing the schedule assessment as unreliable, SCE&G nonetheless tried to hire an employee away from Bechtel who worked on the assessment. Tr. Vol. 15, pgs. 4130-4132.

The Company's lack of prudent decisions extends to the fact that the current and past Chief Financial Officers did not read any of the reports or drafts despite the enormous financial

⁹ ORS believes there is sufficient evidence in the record to reflect that Ty Troutman, Bechtel employee, regularly spoke to Mr. Byrnes during the course of the assessment period and that Mr. Byrnes knew of the content of the draft Bechtel report. ORS does not believe Mr. Wenick edited and reviewed the Bechtel drafts without input from SCE&G. For the sole purpose of this Petition for Reconsideration, ORS is using the story put forward by SCE&G to reflect that a finding of imprudence is required based on the Company's sworn testimony.

importance of the Project to the overall financial position of the company. Tr. Vol. 8, pgs. 2046-2058, ll. 7-23, pgs. 2112-2115. Further, the Commission heard testimony from several Senior Executives that they have no plans to ever read the reports. Tr. Vol. 7, p. 1580, ll. 15-16; p. 1619, ll. 12-24; p. 1620, ll. 15-21; p. 1621. No other SCE&G employee that presented testimony in this hearing admitted to having read or known about the Bechtel report, the Bechtel Report Schedule Assessment, or any of the drafts, prior to their being made public. Of course, by claiming to have not read the drafts or the final report on the schedule assessment, SCE&G witnesses attempted to elude responsibility and avoid being able to answer questions about the significance of the Bechtel Assessment.

(2) SCE&G asserted in response to ORS discovery, **five months after the Bechtel report of October 22, 2015**, that no studies of any delays of the Project's completion dates had been conducted as to do so would be **highly speculative** and of **no probative value**. Hearing Exhibit 28.

(3) SCE&G failed to run delay scenarios that incorporated the up to 36 months delay foretold by Bechtel, which turned out to be more than correct. Hearing Exhibit 28; Tr. Vol. 12 pgs. 3278-3280.

(4) SCE&G failed to act in a timely manner, resulting in increased costs and expenses. After the Westinghouse bankruptcy on March 29, 2017 and *approximately 14 months after informing ORS that any analysis of a delay of the completion dates would be highly speculative*, SCE&G finally did its own analysis in a "owner-directed model" finding that there would be a three-year delay at a cost of an additional \$3 billion dollars. Tr. Vol. 15, pgs. 4135-4138.

(5) SCE&G turned a blind eye and a deaf ear to their own employee warnings to consider the internal EAC reviews and the work performed jointly with Santee Cooper which reflected the

reality of the delays to the construction schedule completion dates. Yet, SCE&G represented to the Commission that the cost and construction schedules filed on March 12, 2015, were the best estimates when SCE&G itself did not believe in the cost or construction schedule. Hearing Exhibit 16, pgs. 0613, 0229, 0584, 1452-1454.

The five points listed above aptly illustrate that the Commission has ample evidence in the record to find that the actions and decisions of SCE&G after March 12, 2015, were imprudent and serve as substantial evidence to justify the disallowance of abandonment costs after that date as required by law and any finding to the contrary is erroneous, arbitrary and/or capricious.

2. The Commission Erred in Failing to Find that Revised Rates Revenue Increases Corresponding with Capital Cost Recovery in 2015 and 2016, and All Revised Rates Collected After August 1, 2017, should be Returned to Customers

At pages 40, 48-49, the Commission's Order provides the basis for its denial of ORS's request to return revised rates revenues for financing costs collected on capital costs exceeding \$2.772 billion, or financing costs on new nuclear construction costs incurred after March 12, 2015. The basis for the denial is that (1) there is no provision for terminating revised rates once they have been granted; and (2) returning these amounts would be a violation of the filed-rate doctrine and constitutes retro-active rate-making.

The abandonment provision of the BLRA expressly authorizes this to Commission to disallow the utility's cost of capital associated with those capital costs determined to be imprudent:

Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.

Furthermore, Act 258, directs this Commission to apply the definitions of imprudent and prudent in this case. Pursuant to S.C. Code Ann. §58-33-240, once a party makes a prima facie case establishing imprudence, thereafter the burden of proof shifts to SCE&G to demonstrate the prudence of the transaction cost, or decision by a preponderance of the evidence. The Order disallows recovery of all Project costs incurred after March 12, 2015 but allows SCE&G to retain revised rates (the return at a blended 11% and 10.5% and financing cost) collected from customers for Project costs incurred after March 12, 2015. This inconsistency in the Commission Order places SCE&G electric customers in the position of directly paying through revised rates the cost of capital associated with the Commission approved disallowance of capital costs.

S.C. Code Ann. §58-33-280 (K) expressly authorizes the Commission to disallow both capital costs and cost of capital where imprudence can be shown. S.C. Code Ann. §58-33-275(A) permits the recovery of capital costs so long as the plant is constructed or is being constructed within the Commission approved construction schedule including contingencies and the approved capital cost estimates including specified contingencies. The Order acknowledges that SCE&G failed to disclose material information. Additionally, SCE&G failed to update its capital cost estimates in its 2015 Revised Rates filings and failed to disclose in the 2016 Revised Rates filings that an assessment of the schedule completion dates revealed the dates were well beyond the dates approved by the Commission, including contingencies, as required by S.C. Code Ann. §58-33-280(B), which requires updated current information as of the date of the filing. The Record is clear that SCE&G never shared with the Commission its cost estimates reflecting an increase of half a billion dollars more than the cost schedules filed with the Commission. It is also undisputed

that SCE&G never shared the schedule assessment of the completion dates.¹⁰

Pursuant to Act 258, the failure to disclose material information is imprudent. ORS respectfully submits that the abandonment provision of the BLRA authorizes the Commission to return the revised rates revenue collected from customers associated with imprudently incurred capital costs.

As to the tenets of the filed-rate doctrine and retroactive rate-making, the General Assembly pursuant to Act 258 provided this Commission the authority to establish an experimental rate that was effective April 1, 2018, pending a final determination in this case. Notwithstanding the arguments of the filed-rate doctrine and retroactive rate-making this Commission's Order establishing an experimental rate effective April 1, 2018, Act 258 has not been overturned.

Additionally, the South Carolina Supreme Court in Edge v. State Farm Mut. Auto Ins. Co., recognized that there are exceptions to the application of the filed-rate doctrine such as breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, and fraud:

Some jurisdictions have recognized that certain circumstances preclude the application of the filed rate doctrine. *See e.g. Am. Bankers Ins. Co. v. Alexander*, 818 So.2d 1073 (Miss.2001) (***holding claims for breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, and fraud were not barred by filed rate doctrine because these causes of action are founded in the common law***).

Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 518, 623 S.E.2d 387, 391 (2005)

Although not applicable in the present case, we also recognize there are several exceptions as set out above which may prevent its application.

Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 519, 623 S.E.2d 387, 392 (2005)

¹⁰ ORS's audit reports for 2015 and 2016 reflect that without approval from the Commission modifying the construction schedule in the 2015-103-E proceeding, SCE&G would not be in compliance with last approved Commission order, and thus, would not have been entitled to a revised rate increase. To the extent SCE&G withheld material information regarding the budget and schedule, SCE&G obtained those revenue increases through intentional misrepresentations to the Commission and ORS.

In the instant case, SCE&G withheld material and adverse information and made continuous misrepresentations to this Commission regarding the budget and construction schedule. Our South Carolina Supreme Court in Edge recognized that the filed-rate doctrine cannot stand under such circumstances. Other jurisdictions have likewise found that the filed-rate doctrine cannot be applied where the utility has engaged in actions involving fraud or misrepresentation. Pink Dot, Inc. v. Teleport Communications Group, 89 Cal.App.4th 407 (2001)¹¹. Furthermore, ORS is not a private party, but a state agency charged with representing the public interest. In Edge, the S.C. Supreme Court noted: “The filed rate doctrine bars only collateral attacks brought by private parties and not direct reviews in ratemaking cases or actions brought by a governmental agency. Commonwealth v. Anthem Ins. Cos., Inc., 8 S.W.3d 48, 53–4 (Ky.Ct.App.1999).”

Regarding retroactive rate-making, this Commission has been directed by Act 258 to set a permanent rate that clearly contemplated and required the Commission to make findings of prudence and imprudence. To the extent, the Commission does not require the return of the revised rates revenue on disallowed capital costs through a reduction in the permanent rate, then the Commission should require SCE&G to defer this amount until returned to the customers in the

¹¹ In California, there are limits to the filed rate doctrine, as is apparent in both the PUC’s opinion in *Re Telephone Corporations*, *supra*, 71 Cal. P.U.C. 229, as previously discussed, and in various cases. In *Empire West*, *supra*, 12 Cal.3d 805, 117 Cal.Rptr. 423, 528 P.2d 31, for example, the court held that a public utility could be liable for fraud when it falsely claimed to have the expertise to prepare a cost analysis of the operating cost of a central gas heating and cooling system requested by the plaintiff. The plaintiff in *Empire West* was induced to enter the contract based on a false representation, just as Pink Dot alleges Teleport falsely represented its ability to install Caller ID and its expertise in providing telephone services in the Los Angeles market.

See also, *Qwest Corp. v. Kelly*, 204 Ariz. 25 (2002): Although there is ample authority in favor of adopting the filed rate doctrine, there is persuasive authority to the contrary. See, e.g., *Pink Dot Inc. v. Teleport Communications Group*, 89 Cal.App.4th 407, 107 Cal.Rptr.2d 392 (2001); *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 104 Cal.Rptr.2d 197 (2001); see also *United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill.2d 1, 205 Ill.Dec. 428, 643 N.E.2d 719 (1994) (holding that when federal statutory scheme does not occupy field, filed rate doctrine does not apply); *Tenore v. American Tel. & Tel. Wireless Servs.*, 136 Wash.2d 322, 962 P.2d 104 (1998) (distinguishing *Hardy v. Claircom Communications Group, Inc.*, 86 Wash.App. 488, 937 P.2d 1128 (1997) and finding filed rate doctrine not implicated in action for fraud and deceptive practices).

next general rate proceeding.

To recover revised rates under the BLRA, SCE&G must be constructing the plants at the time it files for recovery under the BLRA. It is undisputed that SCE&G had ceased construction prior to its request for abandonment costs, the Company is thus precluded by S.C. Code Ann. §58-33-275(A) from recovering these costs. Their request for such recovery thus fails under the provisions of the BLRA. As concluded by the Federal Court in the action brought by SCE&G to prohibit the Commission's imposition of experimental rates, the "so long as the plant is constructed or being constructed" language ceases to constrain the discretion of the Commission.

3. The Commission Erred in Failing to Impose Merger Conditions Related to Possible Expansion of the Atlantic Coast Pipeline.

The Commission erred in failing to impose any merger conditions on the Joint Applicants related to the ACP. In accordance with the testimony and evidence presented by the Southern Alliance for Clean Energy and the South Carolina Coastal Conservation League and supported by the Speaker of the House and ORS, the Commission should impose a merger condition on any future extension of the ACP into South Carolina.

The Commission should act to protect South Carolina Customers by requiring SCE&G to identify a fuel resource need prior to permitting the Joint Applicants to expand the ACP into South Carolina. That identification should include an analysis of the severity, frequency, and seasonal timing of any such need or demand, as well as an evaluation of all reasonable alternatives prior to signing new pipeline capacity contracts. See, Tr. Vol. 9, p. 2291, ll. 5-11. Likewise, if an expansion under those terms is authorized, the Commission should require SCE&G to use the lowest cost provider.

The Commission failure to provide any protections for South Carolina Customers regarding expansion of the ACP evidences that the Commission erred in failing to properly balance the interests of both the utility and its Customers.

4. The Commission Erred in Awarding the Joint Applicants a Return on Equity which is not supported by the record.

In authorizing an ROE of 9.9%, the Commission erred in awarding an excessively high ROE to the Joint Applicants for recovery of Project costs that will never benefit SCE&G Customers and is unsupported by the evidence and testimony in the record.

Only two witnesses presented evidence and expert testimony before the Commission on the issue of ROE: Mr. Baudino for ORS and Mr. Hevert for the Joint Applicants. Mr. Baudino presented substantial information and materials to the Commission in support of his DCF and CAPM analyses, including a review of ROE's awarded in 2018 by other Commissions across the country; which averaged 9.6%. In large part, Mr. Baudino's recommendation of a 9.1% ROE was based on the returns of an investment grade utility company, rather than a hypothetical ROE based on SCE&G's current financial situation. Mr. Baudino's analysis thus failed to reward the Joint Applicants for SCE&G's mismanagement of the Project. While also providing a recommended ROE that is in accord with those awarded to similar utilities. Mr. Baudino's recommendation is therefore objectively fair and neither rewards nor punishes SCE&G for its mismanagement. Mr. Hevert's recommended ROE of 10.75% did, however, provide an economic reward for mismanagement.

The Commission erred when it adopted, without alteration, from SCE&G's proposed order the language stating: "[c]oncludes that the Company's current cost of equity most likely ranges between 10.25% and 11%...and the most likely point estimate of the cost of equity is 10.75%."

Order, pg. 90. The absence of any reasoned discussion as to why the Commission heavily weighted the interests of the Company's Investors over those of its Customers when it determined that a 10.25% ROE for an abandoned project was acceptable is unreasonable. This conclusion, with a lack of discussion or analysis by the Commission has lasting impacts and favors utility investors at the expense of utility customers.

There was no evidence presented by any party to support the Commissions award of a 9.9% ROE. The only evidence presented to the Commission supported ROEs of either 10.75% or 9.1%. Yet, the Commission choose to take a unsupportable conciliatory ROE proposed by the Joint Applicants as appropriate. The total lack of substantial evidence in the record in this case to support the Commission's awarding an ROE of 9.9% constitutes reversible error, as it is unsupported by the record, and should be reconsidered by the Commission.

5. The Commission Erred in Failing to Require SCE&G to Reduce its Electric Rates to Flow Through all the Benefits of the Tax Cuts Jobs Act.

In Order No. 2018-804 the Commission failed to properly recognize or provide to SCE&G Customers the full benefits of the reduction in the Federal Corporate income tax rate effective January 1, 2018 under the TCJA. The Commission adopted in its Order, without any discussion or alteration, the SCE&G position set forth in Company witness Nagy's testimony that using a test year of 2017 is appropriate and serves as an accurate calculation of the income tax savings realized by SCE&G resulting from the application of the TCJA. See, Order 2018-804, pg. 61 and Tr. Vol. 4, p. 991-19, l. 9 to p. 991-21, l. 6. In so doing, the Commission failed to enumerate specific savings to be passed to customers and failed to even recognize the ORS challenges to the SCE&G position, presented through the testimony of witness Lane Kollen, that "the evident problem with this approach is that it allows the Company to use and retain the income tax savings from the TCJA to

offset increases without filing a rate case or allowing the Commission to conduct a comprehensive rate review.” Tr. Vol. 4, p. 991-20, ll. 9-16.

The ORS alternative to SCE&G’s 2017 test year approach, which was not addressed in the Commission Order, provides a more accurate calculation of actual TCJA savings. As established by ORS witness Kollen in testimony before the Commission, income tax expenses included in SCE&G’s present rates is a “known and measurable” amount arrived at by simply reviewing the record in Docket No. 2012-218-E and adjusting the amount to reflect changes in kWh sales. ORS provided substantial evidence, in the form of expert testimony, that this approach, unlike that proposed by SCE&G Witness Nagy and adopted by the Commission, is “exact”. Tr. Vol. 4, p. 991-20. The Commission provided no legal or evidentiary support for its decision to ignore this more precise calculation in favor of the use of a 2017 test year.

ORS witness Kollen further noted that SCE&G presented conflicting positions in its letter to the Commission dated January 24, 2018, and the testimony of SCE&G witness Nagy. In the January letter SCE&G stated that: “[i]f the Joint Application [in Docket No. 2018-370-E] is approved and if the proposed merger between those companies is concluded, Dominion has committed that it will pass the **full amount** of the tax savings arising from the change in tax law irrespective of the effect on SCE&G’s ability to earn its allowed returns.” Tr. Vol. 4, p. 991- 21 (emphasis added). This statement directly conflicts with the testimony of Nagy, which was adopted by the Commission in its Order as the method approved by the Commission fails to provide the “full effect” of the TCJA to Customers.

In addition to Witness Nagy, SCE&G witness Griffin also argued that the Commission should calculate the one-time refund of the 2018 tax savings by using a 2017 test year. ORS witness Kollen testified that the SCE&G proposal as put forth by Witness Griffin was “... contrary to the

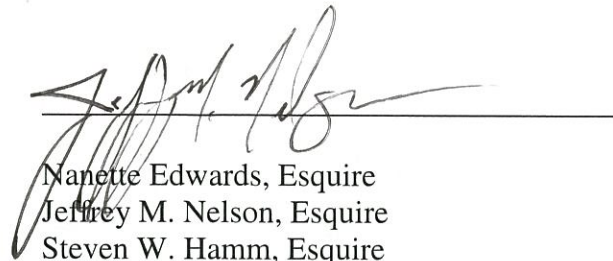
direction the Commission provided to electric utilities in Docket No. 2017 – 381 – A.” Tr. Vol. 4, p. 991-20, l. 9-16. In Order No. 2018-308 in Docket No. 2017-381-A, this Commission Ordered that “beginning January 1, 2018, regulatory accounting treatment is required for all regulated utilities for any impacts of the new law including current and deferred tax impacts. Therefore, the utilities should track and defer the effects resulting from the Tax Act in a regulatory liability account.” That provision of Order 2018-308 has now been directly contradicted by the language in the present Order which allows the Company to use 2017 historical numbers to calculate what benefits of the TCJA which the Company will provide to Customers.

The Commission should reconsider its position regarding the TCJA and find that the ORS treatment of TCJA is consistent with prior directives from the Commission and is both fair and reasonable based upon a careful review of the entire record in this proceeding. Alternatively, ORS asks that the Commission clarify Order 2018-804 to require the Company to maintain regulatory accounting treatment as provided for in Order 2018-308, and for the Commission to consider that any estimated benefits of the TCJA be reconciled to actual tax savings benefits and be provided to SCE&G Customers in the next general rate case.

Conclusion

For the above stated reasons ORS respectfully requests that the Commission reconsider its ruling in Order No. 2018-804.

Dated this 28th day of December 2018.

A handwritten signature in black ink, appearing to read 'Nanette Edwards', is written over a horizontal line.

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